No. 18889

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES HENRY MEADOR, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
for the District of Arizona

BRIEF FOR APPELLEE

FILED

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FRANK H. SCHMID, CLERK

C. A. MUECKE
United States Attorney
for the District of Arizona

JOHN E. LINDBERG
Assistant U. S. Attorney
Attorneys for Appellee

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IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES HENRY MEADOR, JR.,
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vs.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

APPELLEE'S BRIEF

JURISDICTIONAL FACTS

Appellee adopts and accepts Appellant's Jurisdictional Facts.

STATEMENT OF FACTS

Appellee adopts and accepts Appellant's Statement of Facts. In addition thereto, Appellee offers the following informational facts.

The Indictment herein charged the Defendant with escape from Federal custody which escape was alleged to have occurred on or about September 17, 1962. The custody of the Marshal, as indicated in the trial, was based on a removal

warrant (Exhibit 4) issued in the District of Nevada, and, pursuant thereto, the Defendant was received by the Marshal for the District of Arizona on August 23, 1962 (Trial Transcript of Proceedings June 3 and June 4, 1963, at P. 18, hereinafter referred to as TT). The Defendant was at that time, and thereafter, awaiting trial in the U. S. District Court for the District of Arizona at Phoenix, Arizona, in Case No. C-16383-Phoenix. Pursuant to Court order in the aforesaid proceeding the Defendant was examined by Dr. Richard E. H. Duisberg on November 27, 1962 (TT 153), who submitted a written report thereof. Thereafter, and on January 7, 1963, a hearing to determine competency was held in Phoenix in the aforesaid Case No. C-16383-Phoenix. Defendant was found competent by the Court. A copy of the report as submitted by Dr. Duisberg and the transcript of the proceedings were both submitted to the trial court in the instant case on April 19, 1963, when the Defendant's motion for examination to determine competency came on for hearing. (Motion Transcript of Proceedings, April 19, 1963, at P. 5, Line 15 et seq; P. 8, Line 17 et seq; P. 20, Line 1 et seq., Motion Transcript hereinafter referred to as MT). On the basis of the aforesaid report and transcript, the trial court denied Defendant's motion for additional examination into his competency (MT P. 21, Lines 1-4).

During the trial of the case the Defendant, through the testimony of a Larry McDaniel, introduced evidence of the Defendant's obstreperous behavior while imprisoned (TT P. 68, Line 3, et seq), his dislike of the facilities (TT P. 69, Line 1 et seq), and other like anti-social behavior. The Defendant was called upon to testify and evidenced an apparent lack of recall of the details of his escape. (TT P. 108, 110, 128, 129, 130). The Defendant also testified to being hazy (TT P. 108), to hearing voices (TT P. 108) and to attempts to commit suicide (TT P. 109). During Defendant's testimony

the Government objected to certain questions and was variously sustained and over-ruled.

At the conclusion of Defendant's case the Government called a psychiatrist, Dr. Tuckler, who had examined Defendant in June, 1962, pursuant to an Arizona Superior Court order (TT 146). Thereafter Dr. Tuckler testified that it was his opinion that the Defendant knew the difference between right and wrong (TT P. 148, Line 5 et seq), that the Defendant took a volitional course and had control of his actions (TT P. 149, Line 12 et seq).

The Government also called Dr. Duisberg to testify who, after being duly qualified as an expert in the field of psychiatry, testified that he, also having been appointed by the Court, the Arizona District Court, had examined the Defendant (TT P. 156). He testified further that the Defendant knew the difference between right and wrong (TT P. 158) and that he was not mentally ill or psychotic (TT P. 163).

The jury, after instruction by the Court, including instructions on the issue of sanity (TT P. 172-173), found the Defendant guilty.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The Court was correct in not ordering the mental examination as applied for by Defendant.

2. The Court correctly applied its discretion in refusing to allow defense counsel unlimited inquiry into facts and details of Defendant's past life.

3. The Court correctly allowed Dr. Tuckler and Dr. Duisberg to testify over the objections going to privilege.

4. The Court correctly allowed Dr. Tuckler and Dr. Duisberg to testify over the objections going to immateriality.

5. In absence of objection and under the circumstances, Dr. Duisberg's testimony was properly received.

6. The Court correctly denied Defendant's motion for a directed verdict of acquittal at the close of all testimony.

SUMMARY OF ARGUMENT

1. In view of the conclusions reached in mental inquiry shortly preceding Defendant's motion herein, there was no "reasonable cause" to believe that there was need for an additional examination.

2. The details of background inquiry are subject to Court's discretion.

3. Examination made for the sole purpose of giving testimony is not subject to physician/patient privilege.

4. Expert testimony on sanity based on psychiatric examination is material to issue of sanity.

5. Defendant may waive objection to testimony containing his statements made during 4244 examination.

6. Substantial legal evidence supported jury's verdict.

ARGUMENT

1. NO REASONABLE CAUSE FOR ADDITIONAL EXAMINATION INTO COMPETENCY

In the instant case, it is necessary that the element of time be clearly set forth in view of its impact on both the trial court and the application of Title 18 United States Code, § 4244. There is, of course, under the statute, no necessity for a hearing into the competency of a defendant unless the

report of the psychiatrist indicates a state of insanity or incompetency. *Formhals v. U. S.,* (CA 9th, 1960) 278 F.2d 43, 47. The examination and report called for by the statute is based upon "*reasonable cause to believe* that a person charged . . . may be presently . . . mentally incompetent" (emphasis added) to understand the proceedings or aid in his defense. Herein, the Defendant was in County jail on August 3, 1962 (TT P. 66, 115), escaped to Nevada with hostages, was returned to Arizona August 23, 1962 (TT P. 18) to face kidnapping charges in District Court at Phoenix (TT P. 67), escaped again (giving rise to the instant case) on September 17, 1962, and was, thereafter, on November 27, 1962, examined by a psychiatrist pursuant to court order made and entered in the Phoenix case. Although the report of the psychiatrist indicated competency, a judicial determination thereof was made January 7, 1963. The kidnapping trial took place in the Phoenix U. S. District Court on March 8, 1963 (TT P. 92).

Defendant's motion for examination into his competency in the instant case came on for hearing April 19, 1963. Thereat, carrying further the Court's statement cited in Appellant's brief (Ap. Br. P. 7) the Court stated:

> ". . . But it's my feeling in the matter that while counsel is in good faith . . . I don't believe that reason for counsel believing that appears either from the motion or what's been presented here this morning, and for that reason the motion is denied." (MT P. 20)

And earlier the Court stated:

> "Well, I don't have a thing in the world right now that would justify me in doing it. I have Dr. Duisberg's report that he is able to assist in his own defense and under the proceedings, or was in January, and to me I just don't see reasonable grounds to or reason to believe that he may be incompetent." (MT P. 17)

At least part of the "reasonable grounds" asserted on behalf of Defendant went to the length of the examination

and was properly disregarded by the Trial Court (MT P. 6, 14, 15).

In *Wear v. U. S.,* (CA D.C., 1954) 218 F.2d 24 cited by Appellant, the Defendant had a history of insanity and had in fact been committed to a state hospital, not the case herein (TT P. 127). The most that *Wear* would require was an examination by a psychiatrist. As to the Defendant, such an examination had been recently conducted as aforesaid and negatived the requirement of a formal hearing. To the same effect is *Krupnick vs. U. S.,* (CA 9th, 1959) 264 F.2d 213, wherein this Court also indicated that the trial court was not required to be blind to surrounding circumstances. *Krupnick v. U. S.,* supra at P. 216. See also *Lebron v. U. S.,* (CA D.C., 1955) 229 F.2d 16.

2. SCOPE OF INSANITY INQUIRY SUBJECT TO COURT'S DISCRETION

The only restriction complained of by Appellant appears to be the sustaining by the Court of the objections by the Government to the questions and answers appearing on page 104 of the trial transcript. The Court in explaining to Defendant's counsel his ruling stated in part:

> "He may testify about his own state of mind, his recollection and all of the matters in connection with the offense charged here. But to go back into something that antidates the occurrences here, and *go into the facts and details of that is improper.*" (TT P. 105, emphasis added).

The remainder of the Corpus Juris section cited by Appellant is as follows:

> "However, the evidence must be relevant and material to the accused's mental condition *at the time of the commission* of the act charged; and to be admissible the evidence must reasonably justify an inference of insanity, *the scope of the inquiry being subject to the discretion of the Court.*"

(*22a C.J.S. Criminal Law § 620* at p. 439-440). To the same general effect see *20 Am. Juris. 324, Evidence § 349.*

It is submitted that the judge's ruling and explanation was designed to concisely convey this general statement of limits and properly did so. There were only two other objections thereafter made by the Government which were sustained by the Court. (TT P. 107, Line 24; TT P. 111). It is submitted that the sustaining of these two objections was proper.

In any event, much detail of Defendant's past life was brought to the attention of the jury, particularly with regard to this relationship of Defendant with Patricia Spaulding. (TT P. 103, 107, 162).

It should also be noted in this regard that the Defendant's "haziness" *commenced* during his incarceration in March, 1962, (TT P. 133) and that he had no provious history of commitment or psychiatric treatment (TT P. 127). Such "commencement", according to the foregoing authorities sets, in general, the beginning point of the scope of inquiry.

3. EXAMINATION FOR TESTIMONIAL PURPOSE NOT PRIVILEGED

Both of the doctors who testified had examined the Defendant solely for the purpose of report as reflected in their testimony and the evidence before the Court (Government's Motion, Ex. No. 1, Jan. 7, 1963, transcript in No. C-16383-Phoenix; TT P. 146, 156). The physician/patient privilege has no application since, as stated in the *Taylor* case:

> "Examination for testimonial purposes only has nothing to do with treatment. A doctor who makes such an examination is not 'attending a patient'. There is no confidential relation between them." *Taylor v. U. S.,* (CA D.C., 1955) 222 F.2d 398, 402.

The status not being one of physician/patient, the doctrine of waiver has no application.

4. EXPERT TESTIMONY ON SANITY BASED ON PSYCHIATRIC EXAMINATION IS MATERIAL TO ISSUE OF SANITY

The Defendant having elicited *lay* testimony calculated to show insanity and thereby "shift the burden" to the Government now seeks to make that burden impossible by objecting to *expert* testimony on the subject as immaterial. The basis for the contention is that the examination was for the specific purpose of determining competency (TT P. 142, 143). This proposition would, it is submitted, go only to the weight and not the admissibility of such evidence. As to both such weight and the propriety of such diagnosis the Court said in *Overholser v. Lynch,* (CA D.C., 1961) 288 F.2d 388, 393:

> ". . . an examination conducted under § 4244 to determine a defendant's competency must be broad enough to include an inquiry into his mental condition at the time the act in question was committed."

Herein both doctors demonstrated by their testimony that they were in a position to testify materially to Defendant's sanity.

5. DEFENDANT WAIVED OBJECTION-ERROR, IF ANY, HARMLESS

It should first be noted that no objection was made or directed to the question or statement (TT P. 159-160) now complained of for the first time on appeal and should not, therefore, be a subject for consideration herein in the absence of plain error. Such potential objection may be waived by not asserting it. *Bailey v. U. S.,* (CA D.C., 1957) 248 F.2d 558, 560.

The testimony was elicited, in any event, not as to the issue of guilt of the accused, but rather to impeach Defend-

ant's testimony (viz: TT P. 110, Lines 6-10; TT P. 129, Lines 17-25) in his alleged failure to recall.

If, however, the Court considers the reception of such evidence as error, it is submitted that it is harmless error. By the time Dr. Duisberg's statement was received, the evidence going to the elements of the escape was substantial and uncontroverted. In effect the only "issue" of guilt remaining at that time was the question of sanity and not the details of the escape as such. The reception of the doctor's testimony in this regard could not have prejudiced the rights of the Defendant.

6. SUBSTANTIAL LEGAL EVIDENCE SUPPORTED JURY'S VERDICT

The Appellant's argument on the sixth specification of error is a necessary concomitant to the Court's ruling on the admissibility of the testimony of the doctors. This Court's ruling of that testimony as admissible necessarily causes the failure of this specification. The jury, with proper instruction as given, had substantial evidence before it to support its verdict.

CONCLUSION

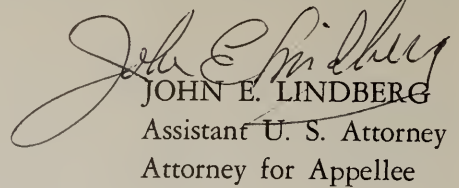
It is submitted that the trial court made proper rulings and the verdict and judgment should be affirmed.

Respectfully submitted,

C. A. MUECKE
United States Attorney
for the District of Arizona

JOHN E. LINDBERG
Assistant U. S. Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



JOHN E. LINDBERG
Assistant U. S. Attorney
Attorney for Appellee

Three copies of within Brief of Appellee mailed this ....12........day of November, 1963, to:

ANTHONY D. TERRY
Attorney for Appellant
509 Phoenix Title Building
Tucson, Arizona